BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

FERNANDO L. SERRATOS	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,024,584
CESSNA AIRCRAFT COMPANY	)	
Self-Insured Respondent	)	

ORDER

Respondent appeals the December 2, 2009, Review and Modification Award of Administrative Law Judge John D. Clark (ALJ). Claimant was awarded a 9 percent permanent partial whole body disability on a functional basis in an Award issued on July 2, 2008. Claimant filed his Application for Review and Modification on December 15, 2008, which resulted in an increase of the original award to a 41 percent permanent partial general (work) disability for injuries suffered on July 16, 2005.

Claimant appeared by his attorney, Dale V. Slape of Wichita, Kansas. Respondent appeared by its attorney, Vincent A. Burnett of Wichita, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Review and Modification Award of the ALJ. The parties stipulate that the June 26, 2008, transcript of Regular Hearing, with the attached exhibits, is part of the record for the purposes of this review and modification. At oral argument to the Board, the parties agreed that the appropriate date of accident in this matter is July 16, 2005. The parties also stipulated that claimant has a 20 percent whole body functional impairment which preexisted this accident and which may be deducted from the final award pursuant to K.S.A. 2005 Supp. 44-501(c). The parties further stipulated that claimant was paid 35.69 weeks of temporary total disability compensation and temporary partial disability compensation during this litigation. Additionally, the parties stipulated that the 22 percent task loss opinion of board certified physical medicine and rehabilitation specialist Michael H. Munhall, M.D., is the only task loss opinion in this record and may be used if the calculation of a permanent partial general (work) disability under K.S.A. 44-510e becomes appropriate. The Board heard oral argument on February 19, 2010.

ISSUE

Has claimant's functional impairment or work disability increased since his original award such that claimant is entitled to an increase in his permanent partial disability benefits pursuant to K.S.A. 44-528? If so, what is the nature and extent of claimant's disability?

FINDINGS OF FACT

Claimant had worked for respondent for over 11 years when, on November 19, 2008, he was terminated for being in violation of respondent's attendance policy. While working for respondent over the years, claimant had filed several workers compensation claims for work-related injuries. In October 1998, claimant suffered a workplace accident resulting in a 7.5 percent permanent partial general body functional impairment for an injury to his low back. This award was in Docket No. 242,606. On September 3, 2003, claimant sustained another work-related accident to his low back resulting in an additional award of 4.75 percent permanent partial general body disability in Docket No. 1,012,964. Then, on July 16, 2005, claimant sustained a third workplace injury to his low back resulting in an additional 9 percent whole body impairment of function. The 9 percent whole person permanent partial disability was awarded to claimant by the ALJ on July 2, 2008. The third injury award, in Docket No. 1,024,584, is the award from which this review and modification was filed on December 15, 2008.

At the time of the termination, claimant had been returned to work at an accommodated position with restrictions of no lifting, pushing or pulling over 20 pounds. Claimant was bagging small parts and acknowledged that he was able to do the job with his back injuries and restrictions. There is a dispute in this record as to whether claimant had incurred all of the attendance points used for his termination. However, even eliminating disputed dates, claimant still exceeded the points needed for a justified termination. Additionally, at the time of his termination, claimant voiced no objection to the dates listed on his attendance record. He did later file a grievance through the union. But claimant's appeal through the union process was unsuccessful.

Prior to the issuance of the July 2, 2008, Award in this matter, claimant was referred by his attorney to board certified physical medicine and rehabilitation specialist, Michael H. Munhall, M.D., for an evaluation on April 3, 2008. Dr. Munhall diagnosed claimant with a posterolateral fusion at L5-S1, an anterior fusion at L5-S1, lumbar dysfunction syndrome and bilateral S1 nerve root adherence. He rated claimant at 15 percent to the whole person pursuant to the fourth edition of the AMA *Guides*.[1] When

[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

presented with the task list of vocational expert Jerry Hardin, Dr. Munhall determined that claimant was unable to perform 6 of 27 non-duplicative tasks for a 22 percent task loss. This is the basis for the stipulation of the parties, above discussed. When Dr. Munhall was provided a description of the accommodated job that claimant was doing for respondent at the time of his termination, he determined that claimant was able, within his restrictions, to perform that job.

Claimant was referred by respondent to vocational expert Steve Benjamin for an evaluation on October 6, 2009. Mr. Benjamin testified that claimant had been working with restrictions for respondent at the time of claimant's termination and that claimant had stated that he was able to perform that job without difficulty. Mr. Benjamin stated that claimant's restrictions were determined from the functional capacities evaluation (FCE) performed on him on April 19, 2004.

Jamie Rutledge, respondent's human resource generalist, testified that, had claimant not been terminated, he would have continued his employment at respondent at the same wage and with the same fringe benefits as he was receiving at the time of the termination. Claimant's last day of employment with respondent was on November 18, 2008. At the time of the regular hearing in this matter, claimant was looking for work, but remained unemployed.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 44-528 states:

> (a) Any award or modification thereof agreed upon by the parties, except lump-sum settlements approved by the director or administrative law judge, whether the award provides for compensation into the future or whether it does not, may be reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. In connection with such review, the administrative law judge may appoint one or two health care providers to examine the employee and report to the administrative law judge. The administrative law judge shall hear all competent evidence offered and if the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or reinstate a prior award, upon such terms as may be just, by increasing or diminishing the compensation subject to the limitations provided in the workers compensation act.
>
> (b) If the administrative law judge finds that the employee has returned to work for the same employer in whose employ the employee was injured or for another employer and is earning or is capable of earning the same or higher wages than the employee did at the time of the accident, or is capable of gaining an income from any trade or employment which is equal to or greater than the wages

> the employee was earning at the time of the accident, or finds that the employee has absented and continues to be absent so that a reasonable examination cannot be made of the employee by a health care provider selected by the employer, or has departed beyond the boundaries of the United States, the administrative law judge may modify the award and reduce compensation or may cancel the award and end the compensation.
>
> (c) The number of reviews under this section shall be limited pursuant to rules and regulations adopted by the director to avoid abuse.
>
> (d) Any modification of an award under this section on the basis that the functional impairment or work disability of the employee has increased or diminished shall be effective as of the date that the increase or diminishment actually occurred, except that in no event shall the effective date of any such modification be more than six months prior to the date the application was made for review and modification under this section.

In the Award issued on July 2, 2008, claimant was granted a 9 percent permanent partial whole body functional disability for the injuries suffered on July 16, 2005. Claimant continued in the employ of respondent until his termination on November 19, 2008. The review and modification was then filed on December 15, 2008, well within the 6-month limitation of K.S.A. 44-528(d). Therefore, any modification of this award, if appropriate, will take effect on the date following claimant's termination.

Claimant does not argue that his functional disability has increased. Additionally, the task loss opinion of Dr. Munhall is the only one in this record. There is no indication that this task loss has altered in any way since the original award. The only change in this record stems from claimant's loss of job and resulting wage loss.

The Kansas Supreme Court, in *Bergstrom*[2], requires that the fact finder follow and apply the plain language of K.S.A. 44-510e which requires that a post-injury wage loss must be based upon the actual average weekly wage claimant earned while working as compared to the average weekly wage claimant is earning after the injury. Here, claimant is not working and has no income. Therefore, the wage loss difference is 100 percent. In looking at the resulting wage loss, *Bergstrom* does not ask why. It merely calculates the loss and applies the resulting number. This review and modification proceeding simply addresses whether claimant's permanent partial disability has increased. As his income loss means claimant no longer is earning 90 percent of his pre-injury average weekly wage, his permanent partial disability is no longer limited to his percent of functional impairment. His permanent partial disability is defined as:

> . . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period

---

[2] *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009).

> preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.[3]

Claimant's wage loss has increased to 100 percent. Therefore, the disability has clearly increased and a modification is required.

The dissent attached to this decision argues that the language of K.S.A. 44-510e differs from the language of K.S.A. 44-528. The Kansas Supreme Court, recently in *Bergstrom*[4], eliminated the requirement that a claimant prove good faith in a post-award job search. The Court ruled that, where the language of a statute is clear, it is not the obligation of a court to resort to statutory construction or to speculate as to legislative intent. The language of K.S.A. 44-510e mandates that once an injured worker is no longer earning 90 percent or more of his or her pre-injury average weekly wage, then the measure of disability is the percentage of task loss averaged with the percentage of wage loss. However, there is a statutory distinction between the work disability calculation in K.S.A. 44-510e and the post-award review and modification language in K.S.A. 44-528, which asks if the worker is earning or is capable of earning the same or higher wages. If so, the original award may be modified, reduced, or eliminated entirely.

This question is one not yet determined by the appellate courts in Kansas since the *Bergstrom* decision was issued. The Kansas Court of Appeals, as affirmed by the Kansas Supreme Court, did address the issue pre *Bergstrom*. In *Asay*[5], the Court was asked to determine if the language in K.S.A. 44-528 dealing with an employee's capability to earn the same or higher wages altered the test for determining compensable permanent partial general disability under K.S.A. 44-510e. The Court was comparing the claimant's ability to engage in work of the same type and character that he was performing at the time of his injury (the then effective test for work disability) to the language of K.S.A. 44-528. The Court determined that the language of K.S.A. 44-528 did not justify cancellation of an award unless the claimant had regained the "ability . . . to engage in work of the same type and character that he was performing at the time of his injury."[6] The Court also determined that the language of K.S.A. 44-510e, which had been modified in 1974, trumped the older

---

[3] K.S.A. 44-510e(a).

[4] *Id.*

[5] *Asay v. American Drywall*, 11 Kan. App. 2d 122, 715 P.2d 421, aff'd 240 Kan. 52, 726 P.2d 1332 (1986).

[6] *Id.* at Syl. ¶ 4.

language in K.S.A. 44-528, ruling that "where there is a conflict between two statutes which cannot be harmonized, the later legislative expression controls."[7]

The Board finds that K.S.A. 44-510e controls in this matter over the general language in K.S.A. 44-528 and reflects the legislature's most recent expression of its intent on how permanent partial general (work) disability awards are to be computed. Thus, the test is claimant's actual wage earnings, post award, and not his capability to earn the same or higher wages.

K.S.A. 44-510e, thus, requires that the wage loss and task loss be averaged, with the numerical result being the work disability. Here, a 22 percent task loss averaged with a 100 percent wage loss results in a work disability of 61 percent effective November 19, 2008. Pursuant to the above stipulation, this award will be reduced by the stipulated 20 percent preexisting whole body functional impairment. The result is that the award of the ALJ shall be affirmed.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Review and Modification Award of the ALJ should be affirmed.

The Review and Modification Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Review and Modification Award of Administrative Law Judge John D. Clark dated December 2, 2009, should be, and is hereby, affirmed.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Fernando L. Serratos, and against the self-insured respondent, Cessna Aircraft Company, for an accidental injury which occurred July 16, 2005, and based upon an average weekly wage of $1,142.84.

Claimant is entitled to 35.69 weeks of temporary total disability compensation and temporary partial disability compensation at the rate of $467.00 per week totaling $16,667.23, followed by 35.49 weeks of permanent partial disability compensation at the

---

[7] *Id*. at 126.

rate of $467.00 per week totaling $16,573.83 for a 9 percent permanent partial general body functional disability, followed by 126.18 weeks of permanent partial general body disability compensation at the rate of $467.00 per week totaling $58,926.06 for a 41 percent work disability, making a total award of $92,167.12.

As of March 9, 2010, there is due and owing claimant 35.69 weeks of temporary total disability compensation and temporary partial disability compensation at the rate of $467.00 per week totaling $16,667.23, followed by 35.49 weeks of permanent partial disability compensation at the rate of $467.00 per week totaling $16,573.83 for a 9 percent functional disability, followed by 68.0 weeks of permanent partial disability compensation at the rate of $467.00 per week totaling $31,756.00 for a 41 percent work disability, for a total of $64,997.06, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $27,170.06 is to be paid for 58.18 weeks at the rate of $467.00 per week, until fully paid or until further order of the Director.

IT IS SO ORDERED.

Dated this ____ day of March, 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned respectfully dissents from the award of the majority. K.S.A. 44-528 is specific in directing the method of determining whether a modification of an award is proper. The statute requires a determination of an employee's capability to earn equal or greater wages than that being earned at the time of the accident. The Supreme Court, in an opinion which sent shock waves through the workers compensation bar in Kansas, was

very specific in *Bergstrom*[8] in determining that the Court's obligation is to give effect only to express statutory language, rather than speculating on what the law should or should not be. The Court of Appeals, more recently, when discussing *Bergstrom* in *Tyler*[9], noted that judicial notions regarding the legislature's intent in the enactment of K.S.A. 44-510e(a) are not favored. The Court in *Tyler* went on to warn that "[j]udicial blacksmithing will be rejected even if such judicial interpretations have been judicially implied to further the perceived legislative intent."

The judicial intent contained in K.S.A. 44-528 requires a determination as to whether a claimant is capable of earning the same or higher wages as those being earned on the date of accident. Here, claimant has the ability to return to the same job with respondent, earning the same wages and receiving the same fringe benefits. The only thing preventing this result is the termination due to attendance problems on claimant's part. Claimant's earning "capability" is not in dispute with regard to his former accommodated job with respondent. Therefore, claimant should be limited to his functional impairment pursuant to K.S.A. 44-528 and denied additional permanent partial general disability under K.S.A. 44-510e.

BOARD MEMBER

c: Dale V. Slape, Attorney for Claimant
Vincent A. Burnett, Attorney for Respondent
John D. Clark, Administrative Law Judge

[8] *Bergstrom, supra.*

[9] *Tyler v. Goodyear Tire & Rubber Company*, ___ Kan. App. 2d ___, ___ P.3d ___ (2010) (No. 102,236, 2010 WL 668907, filed Feb. 26, 2010).